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No. 87-159

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE OHIO CASUALTY INSURANCE COMPANY,
Petitioner,

v.

DOWNEY SAVINGS AND LOAN ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CALIFORNIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The California Bankers Association ("CBA") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari. Consent to the filing of this brief has been obtained from petitioner. Respondent has refused consent.

CBA is the statewide trade association for the commercial banking industry in California. Its membership con-

sists of nearly all of the more than 450 commercial banks in the State of California, including 164 banks chartered by the United States. An important aspect of CBA's activities is presenting its members' views on issues involving banking interests before all branches of the state and federal government. Toward that end, CBA has filed *amicus curiae* briefs in this Court in a number of cases affecting the commercial banking industry.

The case before the Court raises significant issues concerning the procedural safeguards required by the Eighth Amendment's prohibition against excessive fines and by the due process clause of the Fourteenth Amendment in actions involving punitive damage claims. Specifically at issue is whether these safeguards should protect defendants in civil actions where it is increasingly common for large fines to be imposed for punitive purposes.

The California Supreme Court's denial of review leaves standing a holding by the California Court of Appeal that the Eighth Amendment applies only in criminal prosecutions and that due process does not require any additional safeguards in civil cases involving determinations of whether and how great a punitive damage award will be imposed. The major consequence of the decision below will be to permit discretionary punitive damage assessments by juries, with virtually no effective protections against arbitrary, prejudicial, and excessive awards.

The members of CBA have increasingly been subjected to ever larger punitive damage awards in California and are directly affected by the decision. *Amicus* is concerned that these awards, which are subject to only limited review, and which frequently involve issues of first impression concerning common practices of commercial banks, threaten the stability of the banking industry and undermine the ability of financial institutions to protect deposits and finance economic development. CBA, moreover, is particularly able to present to the Court the views of an important segment of the business community on the

issues presented in this case and to offer a broader perspective than that provided by the parties before the Court. As a result, CBA requests permission to submit its views on these important issues.

WHEREFORE, CBA respectfully requests that this motion be granted.

Respectfully submitted,

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BRIEF OF THE CALIFORNIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

The California Bankers Association ("CBA") respectfully refers the Court to the description of its interest presented in its accompanying Motion for Leave to File Brief.

REASONS FOR GRANTING THE WRIT

Petitioner Ohio Casualty Insurance Co. seeks review after the California Supreme Court denied review of a California Court of Appeal affirmance of a $5 million punitive damage award against an insurance company for a failure to pay a claim that the jury determined

caused approximately $153,000 in actual losses to respondent, the plaintiff. Petitioner argues that the punitive assessment (1) is grossly excessive, in contravention of the "Excessive Fines" Clause of the Eighth Amendment; (2) was sustained on the basis of a substantive legal standard non-existent at the time the alleged wrongful conduct occurred, and (3) was not imposed through a procedure that is minimally consistent with fundamental fairness and was therefore violative of due process safeguards of the Fourteenth Amendment.

Although this Court has stated that these issues are "important" and "in an appropriate setting, must be resolved," these issues have not yet been decided. Indeed, the Court has never decided even the threshold issue of whether the constitutional provisions invoked in this case impose even minimal limits on punitive assessments in civil cases.[1] Review is timely, in light of the sharp in-

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[1] In *Aetna Life Insurance Co.* v. *Lavoie*, 106 S. Ct. 1580, 1589 (1986), this Court acknowledged that the issue of punitive damages is ripe for review, stating that the defendants' arguments that "a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment . . . raise important issues which, in an appropriate setting, must be resolved." Amicus respectfully submits that this case offers an appropriate vehicle for this Court to address these important issues.

The question of whether the Eighth Amendment applies to punitive assessments is presently before the Court in *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987). The instant case presents, in addition to Eighth Amendment arguments, clear issues concerning the requirements under the Fourteenth Amendment that due process be accorded defendants subject to punitive assessments. Moreover, the instant case raises these issues in the context of an action by a corporate, rather than an individual plaintiff, thereby focusing the case squarely on the broad policy implications of the recent explosion in the size and frequency of punitive assessments. It therefore provides a basis for fuller examination of punitive assessments than *Crenshaw*.

crease in the size and frequency of such punitive assessments and the recent expansion of tort law into previously unaffected areas of commerce, resulting in enormous actual and potential liability of major businesses, including financial institutions. Indeed, the costs of such punitive assessments constitute a detriment not only to such institutions, but to customers and the community at large. As a consequence of recent changes, the harm posed by any constitutional defect in the procedures governing punitive damage awards is severe. Even if due process did not historically require special safeguards for punitive assessments, the explosion of punitive damage awards in California and elsewhere demonstrates that such safeguards are necessary today to guarantee that the factual and legal issues raised in punitive damage actions are resolved fairly.

ARGUMENT

California courts have witnessed a recent sharp increase in both the incidence and size of punitive damage awards, precipitated in large part by what has been called the "tortification of contract," *i.e.*, the creation of tort remedies for what once were simple breach of contract cases. Excessive punitive damage awards threaten the continued economic stability of critical institutions, especially commercial banks. Yet, under current practice, there is no effective check on the discretion of juries to assess damages.

In California, "punitive" or "exemplary" damage are expressly intended by statute and case law to *punish*. Indeed, they typically exceed criminal penalties for comparable conduct, in terms of both the amount of monetary penalty and the stigma accompanying the assessment of such fines.[2]

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[2] The maximum monetary sanction in the present case, if the court had found the petitioner wilfully violated an existing order prohibiting it from failing "in good faith . . . [to] effectuate prompt, fair and equitable settlements of claims" pursuant to the California

To be sure, a state may choose to implement its public policy by authorizing such punitive assessments in private "civil" suits. At a minimum, however, such assessments should be subject to the safeguards of the Excessive Fines Clause and the Due Process Clause of the Fourteenth Amendment, just as a fine in a criminal case would be subject to such safeguards.

I. CALIFORNIA, LIKE THE NATION, HAS WITNESSED AN UNPRECEDENTED INCREASE IN THE INCIDENCE AND SIZE OF PUNITIVE ASSESSMENTS

Large punitive damage awards have recently and suddenly become pervasive and commonplace. They have, moreover, become the focus of searching criticism by the courts and the legal community.[3] More than ever before,

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Insurance Code, would have been $500. Cal. Insur. Code § 790.03 (h) (5) (Deering 1976). The punitive assessment in the present case was thus 10,000 times greater than the maximum fine for analogous conduct.

Another example of the dramatic discrepancy between statutorily prescribed fines and discretionary punitive assessments appears in *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (prob. juris. noted Mar. 9, 1987). In *Crenshaw*, a Mississippi case involving allegedly unfair insurance practices, in which the jury had arrived at a punitive assessment of $1.6 million, had the appellant been convicted in the courts of Mississippi under the analogous criminal provisions, the maximum fine that could have been assessed was $1,000. Miss. Code Ann. § 83-5-85 (1972).

[3] *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1 (1982); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982); M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* (RAND Corp., Institute for Civil Justice, 1987); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Ford. L. Rev. 37 (1983); Shulkin, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L. J. 1797 (1979); Wheeler, *The*

it is important for this Court to review current procedure and outline at least the minimal constitutional safeguards for imposing punitive assessments.

A. Recent Cases Against Banks in California Are Typical of the Recent Trend in Punitive Damage Awards

Three punitive assessments in the first six months of 1987, totalling nearly $100 million against three different California banks illustrate the scope and magnitude of the issue.

1. In *Stanghellini Ranch Inc.* v. *Bank of America*, No. 35448 (Sutter County Superior Court, April 28, 1987), a farming corporation, and three individuals (the owner of Stanghellini Ranches, and two members of his family liable as borrowers and guarantors of the corporation's debt) brought an action against Bank of America, based on a claim that the bank had fraudulently lent money to a farm, expecting that it would not be repaid, in order to gain control of the farm's assets. The plaintiffs sued on a variety of theories, including fraud and constructive fraud. They contended that Bank of America had "induced" the corporation to borrow increasingly large sums of money, and had persuaded the individuals to guarantee the loans, knowing that the corporation would eventually default. They alleged that the bank did this in order to assume control of the assets of the corporation. The plaintiffs also sued for damages for emotional distress, purportedly suffered when they eventually realized the nature of the Bank's alleged fraud. After finding for the plaintiffs on the fraud and emotional distress allegations, the jury assessed compensatory dam-

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Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983); Ghiardi & Kircher, *Punitive Damages Law and Practice* (1985). *See also Rosenbloom* v. *Metromedia*, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting); *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 759, 168 Cal. Rptr. 237, *appeal dismissed*, 450 U.S. 1051 (1981) (Elkington, J., concurring).

ages of $20 million, and added a $30 million assessment in punitive damages.

2. In *Bank of California, N.A.* v. *California Land & Equipment Leasing Co., Inc.*, No. 305952 (Sacramento County Superior Court, June 24, 1987), ten investors in various farming partnerships organized by California Land & Equipment Leasing Co. ("Cal Land") and its principals cross-complained against Bank of California after it sued to collect loans it had made to Cal Land. Investors alleged that the bank had concealed from them information concerning misuse of the loans by Cal Land and its principals and in so doing had breached duties of disclosure and good faith. Bank of California denied that it had concealed information from the investors and argued that it owed them no duties whatever, as it had no contractual or other relationship with them. The jury awarded $3.7 million in compensatory damages and $22.6 million in a punitive assessment.

3. In *Conlan* v. *Wells Fargo Bank*, No. 82852 (Monterey County Superior Court, June 11, 1987), the plaintiffs, a farming general partnership and its managing partner, brought an action against Wells Fargo Bank alleging that the bank wrongfully terminated its loans to the farming operation and refused to provide further crop financing. At the time the bank made the decision not to advance further financing, it had determined that the plaintiffs had sustained over $2 million in losses and that the operation was not creditworthy. Moreover, the parties had agreed that if losses reached that figure, the bank could refuse any further financing. After the bank declared a default by the plaintiffs on their debt of approximately $4.5 million to the bank, the plaintiffs brought an action against the bank alleging, *inter alia*, that the bank had originally induced the plaintiffs to enter into the credit agreements through fraudulent representations, that it breached its agreement by declaring the plaintiffs in default, and that it breached the implied covenant of good

faith and fair dealing arising from the bank's purported "special relationship" to its debtor when it terminated the plaintiffs' credit and accelerated the debt. Finding for the plaintiffs, the jury awarded $10 million in compensatory damages, and $50 million in punitive damages. An affidavit of a juror in support of the defendants' motion for a new trial affords a rare insight into the jury process. According to the affidavit, jurors stated that the damages should include amounts to "teach the Bank a lesson," to pay for the plaintiffs' attorneys' fees, and to "give plaintiffs enough money so that they would not have to borrow money again." [4]

B. New Developments in California Tort Law Have Contributed to a Steep Increase in Punitive Damage Awards

As these cases suggest, California has witnessed a revision of the traditional principles of contractual liability—a process that has been termed the "tortification of contract." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* (1987) iv. Until recently, California tort and contract remedies remained distinct, as at common law. Remedies for breach of contract were primarily compensatory, though parties could stipulate to payment of attorneys' fees. Punitive assessments were available only in tort actions, as specifically articulated

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[4] The trend is by no means limited to California. In *Robinson* v. *McAllen State Bank*, No. C-1948-84-D (Texas 206th Dist. Ct., May 12, 1987), the plaintiffs brought an action against the Texas Commerce Bank alleging misrepresentation and breach of the duty of good faith and fair dealing to its loan customers. The plaintiffs had borrowed from the bank on two different occasions to finance construction of a furniture warehouse and showroom, in each case using a plot of land as security for the loans. After the plaintiffs paid off the second, smaller loan, the bank refused to release the deed of trust on the second plot of land, claiming it was part of the security on the first loan. Finding for the plaintiffs, the jury awarded them $59.2 million, including a $50 million punitive assessment against the Texas Commerce Bank.

in California Civil Code Section 3294, which provides in relevant part that "[i]n an action for the breach of an obligation *not arising from contract*, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant." Cal. Civ. Code § 3294, subd. (a) (Deering Supp. 1986) (emphasis added).

Recently, however, plaintiffs alleging the breach of certain types of contract have been afforded the right to sue in tort, and thus to demand punitive damages for conduct formerly considered merely contractual. This development has its origin in the holding that insurance companies have a "special duty" to policy holders, who purchase insurance not for financial gain, but to secure "peace of mind." *See, e.g., Crisci* v. *Security Insurance Co.*, 66 Cal. 2d 425, 431-33, 58 Cal. Rptr. 13 (1967); *Gruenberg* v. *Aetna Insurance Co.*, 9 Cal. 3d 566, 573-74, 108 Cal. Rptr. 480, 510 P.2d 980 (1973); *Neal* v. *Farmers Insurance Exchange*, 21 Cal. 3d 910, 920-21, 148 Cal. Rptr. 389, 582 P.2d 980 (1978). This principle was then extended to protect long-time employees terminated without good cause, *Cleary* v. *American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), to penalize parties to contracts who seek to shield themselves from liability by denying in bad faith the existence of a contract, *Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.*, 36 Cal. 3d 752, 206 Cal. Rptr. 354, 686 P.2d 1158 (1984), and, most recently, to allow certain bank depositors to recover punitive assessments. *See Commercial Cotton Co.* v. *United California Bank*, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985) (affirming a $100,000 punitive damage award and compensatory damages of $4,000 imposed against a bank for having, on advice of counsel, refused to reimburse an account for a debit on grounds found later to have been spurious); *Barrett* v. *Bank of America*, 183 Cal. App. 3d 1362, 229 Cal. Rptr. 16 (1986) (holding that the relationship of a bank to its

loan customers is at least "quasi-fiduciary," giving rise to a duty of disclosure of facts that may place the bank at an advantage vis-à-vis the customer). As the recent cases summarized above indicate, this transformation is now virtually complete, for it is commonplace in California for banks to be sued for punitive damages by borrowers—corporate and otherwise—on the theory that the lender acted in bad faith.[5]

C. The Recent Increase in Punitive Assessments Against Defendants Has Been Dramatic

The financial implications of this breakdown in traditional distinctions between contract and tort law have been dramatic. A recent study by the Institute for Civil Justice shows that in the 1980s, since the expansion of tort remedies in California, one-third of punitive damage awards imposed in cases based on claims of breach of contract stemmed from allegations of bad faith on the part of a corporate defendant. M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* (1987) ("Rand Study") vi-x, 19-24. Between 1960 and 1984, the number of awards in business tort and breach of contract cases tripled. Between 1980 and 1984, bad faith claims comprised one-fourth of all punitive damage awards. Amounts of damages also increased greatly, with punitive damages in bad faith actions against businesses accounting for almost half of all dollars awarded as punitive damages during that four-year period. The median punitive damage in bad faith actions was $336,000, but the average of such awards was considerably higher, particularly in Los Angeles, where bad faith punitive awards averaged over $3 million. Rand Study at vi-vii.

The Rand Study attributes the explosion in punitive damages since 1960 in large part to expansion of tort

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[5] Both the *Commercial Cotton* and *Barrett* cases involved legal issues of first impression and yet punitive damages were still permitted.

liability against insurance companies, employers, and other businesses traditionally immune to punitive damages for breach of contract. As a result, recent years have seen a sharp upward trend in the size of both extraordinary and routine punitive damage awards, with the greatest rise occurring against businesses in bad faith claims, and the dollar sum of the largest awards increasing most dramatically. Rand Study at ix.

Similarly, insurance sources report that between 1983 and 1985, California courts entered thirty-eight punitive damage awards in excess of one million dollars. In the first half of 1985 alone, five California juries entered punitive damage awards totalling $242 million. J. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 145 (1986).

The crushing impact of punitive damage awards against banks has been consistent with that trend. Consequently, vast sums have flowed into private hands, as plaintiffs have received windfall punitive damage assessments, thus increasing the risk for depositors of bank insolvency and discouraging banks from financing new business ventures.[6]

II. EIGHTH AMENDMENT AND DUE PROCESS SAFEGUARDS SHOULD BE APPLICABLE TO PUNITIVE DAMAGE AWARDS

In order to promote its public policy, a state must be free to punish and stigmatize wrongdoers and to use punitive assessments to that end. At the same time, such punishment and stigmatization of wrongdoers should be subject to at least minimal constitutional safeguards, as

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[6] Thus, in the recent case *International Weighing Systems* v. *Bank of Redlands*, No. 220127 (San Bernardino County Superior Court, July 26, 1987), a jury assessed $3.6 million in punitive damages along with a $1.1 million compensatory award, resulting in a judgment against the bank amounting to 40% of its capital. If finally enforced, this punitive assessment will undoubtedly result in the insolvency of the bank.

are other means of penalizing conduct. Both the Eighth Amendment prohibition against "excessive fines" and the Fourteenth Amendment's requirement of due process should limit the imposition of such penalties.

A. Punitive Assessments in California are Penal

Punitive assessments in California are imposed for the express statutory purposes of punishment and deterrence. California Civil Code Section 3294 states that such awards are to be imposed "for the sake of example and by way of punishing the defendant." The California Supreme Court has emphasized that "[t]he purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." *Neal* v. *Farmers Insurance Exchange, supra*, 21 Cal. 3d at 928 n.13; *see also Egan* v. *Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 820, 169 Cal. Rptr. 691, 620 P.2d 141 (1979), *cert. denied* and *appeal dismissed*, 445 U.S. 912 (1980); *Evans* v. *Gibson*, 220 Cal. 476, 490, 31 P.2d 389 (1934).

Standard jury instructions approved by the California Judicial Council, an official judicial body, reflect the penal purpose of punitive damages. Informed that punitive damages are "for the sake of example and by way of punishment," jurors are instructed to consider three factors in setting the amount of damages: the reprehensibility of the defendant's conduct, the amount of punitive damages that will have a deterrent effect in light of the defendant's financial condition, and the amount of compensatory damages. 2 *California Jury Instructions—Civil, Book of Approved Jury Instructions* ("BAJI") No. 14.71 (1986 Revision) (App. A).

Properly conceived, therefore, punitive damages are not strictly "damages" at all, but are imposed as penalties, as the Civil Code puts it, "for the sake of example and by way of punishing the defendant." Defendants are meant to be made "examples," *i.e.*, stigmatized, and the publicity attendant to a punitive assessment typically ensures this goal. Defendants are also meant to be "pun-

ished" and the amounts imposed do so, even more so than criminal fines, which are typically many times less severe. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 280-81 (1983). In short, punitive damages in California are intended to be and are penal in character.

B. The Eighth Amendment Prohibition Against Excessive Fines and Requirement of Proportionality Review Should Apply Equally to Civil and Criminal Punishments

It is difficult to understand why, as the Court of Appeal has effectively held in this case, a $100 fine can be imposed in a "criminal" case only after a full panoply of constitutional safeguards but a $10 million punitive assessment in a "civil case," expressly made for purposes of punishment and stigmatization, can be inflicted without regard to any such safeguards. Because such civil and criminal punishments are equivalent in their aim and their effect on defendants, they should be subject to equivalent limits.

The Eighth Amendment stands for the "principle that a punishment should be proportionate to the crime." *Solem* v. *Helm*, 463 U.S. 277, 284 (1982).[7] A state should not be permitted to escape this principle by labelling its punishment as merely "civil."

Accordingly, this Court has recognized that certain forms of punishment must be treated as criminal under

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[7] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. By contrast to other Bill of Rights provisions, such as the Fifth Amendment, stating that "no person shall be held to answer for a capital, or otherwise infamous *crime* unless on a presentment or Indictment of a Grand Jury," (emphasis added) and the Sixth Amendment, made applicable to "all *criminal* prosecutions," (emphasis added) there is no language limiting the prohibition against excessive fines to criminal proceedings.

the Eighth Amendment, although not explicitly designated as criminal. *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 ("Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment").

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court formulated a seven-part test for determining when a civil penalty should be governed by criminal procedural safeguards.[8] That test should be used for evaluating punitive damage awards and for determining when criminal procedural safeguards, including the Eighth Amendment's prohibition against excessive fines, should adhere. As shown by the standard BAJI instruction routinely used in California (App. A), as well as by the governing statutory and case law, punitive assessments in California meet virtually all of those factors: (1) they have historically been regarded as punishment and the statute authorizing them expressly so states (Civil Code § 3294); (2) they require a finding of intent to oppress that is comparable to "scienter"; (3) they are used to exact retribution and deterrence, *i.e.*, as the Civil Code states, they are imposed "for the sake of example and by way of punishing the defendant"; (4) much of the conduct subject to punitive damages is made criminal by other statutes; and (5) California ascribes no alternative purpose apart from punishment and example to punitive damages. *See* Jeffries, *A Comment on*

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[8] The relevant factors are: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Id.*

the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 150-51 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 349 (1983).

If this Court agrees that punitive assessments are penal in character, and therefore subject to the limits of the Eighth Amendment, then the proportionality test of *Solem* v. *Helm*, 463 U.S. 277 (1983), is applicable. In *Solem*, this Court looked to three factors in assessing the proportionality of a criminal sentence: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. By this means, courts imposing punishments are held to an objective standard in setting fines or other punishment and the danger of excessive penalties is minimized.

California's standard jury instruction requires an altogether different standard, one that is incongruous with the Eighth Amendment test articulated in *Solem*. First, it requires that the jury consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition." (App. A.) Thus, rather than measuring proportionality by requiring that civil defendants be assessed the same penalty for the same conduct, as the second factor of the *Solem* test dictates, the BAJI instruction *requires* juries to impose larger penalties against wealthier defendants. As the Rand Study and the recent bank cases discussed above reveal, penalties against corporate defendants can prove to be literally millions of dollars greater than the penalty for comparable conduct that might be assessed against an individual defendant. Second, the BAJI instruction requires that "the punitive damages must bear a reasonable relation to the actual damages." (App. A.) This, again, is inconsistent with the Eighth Amendment requirements this Court outlined in *Solem*: The BAJI in-

struction requires the jury to gear the amount of punitive damages to the actual damages assessed, completely ignoring the requirement in *Solem* that penalties imposed in criminal cases for the same conduct be taken into account.

Moreover, California judges are unable to correct jury assessments unless they find "passion or prejudice." *See Bertero* v. *National General Corp.*, 13 Cal. 3d 43, 65 n.12, 118 Cal. Rptr. 184, 529 P.2d 608 (1974). Application of *Solem* to cases involving punitive assessments would correct that lack of review by requiring that the court undertake a proportionality analysis under the Eighth Amendment.

B. Due Process Requires Procedural Safeguards in Punitive Damage Assessments

Before a jury can assess punitive damages, it must first find the defendant "guilty of oppression, fraud or malice" (BAJI No. 14.71, App. A). Yet it is precisely such a predicate that is likely to excite a jury's passion and prejudice, and thus precisely such circumstances in which safeguards against runaway assessments are most needed. There are very few purported limits at present. A California jury is merely instructed that the law "leaves the amount [of punitive damages] to the jury's sound discretion, exercised without passion or prejudice." (BAJI No. 14.71, App. A.) In arriving at the amount, the jury is told to consider the "reprehensibility of the conduct of the defendant," the amount that will "have a deterrent effect on the defendant in light of the defendant's financial condition [which, for financial institutions is usually substantial], and that the amount "must bear a reasonable relation to actual damages" (App. A).

A jury inflamed by reprehensible conduct to begin with will, of course, be inclined favorably to the standard jury argument that, in light of the vast assets of a bank defendant, it is necessary for the jury to impose a large

penalty in order to "teach the bank a lesson." As one California lawyer observed, commenting on the recent spate of successful lawsuits by customers against financial institutions, ' "Jurors themselves are bedeviled by banks . . . and they're ready to swing.' " *Private Courts, Bank Bashing and Zsa Zsa: Convening Lawyers Find Plenty to Discuss*, Wall St. J., Aug. 12, 1987, section 2, at 21, col. 5. The standard jury instruction actually encourages large awards in such circumstances. Moreover, as one commentator has remarked,

> Decisions by trial judges remitting damages awarded by juries are no less the result of visceral reaction than the juries' original awards. And the law is significantly blank on the standards which courts should apply in assessing the awards .... The official reports of later decisions contain no standards and little reasoning; rather certain dollar amounts are sustained and others disallowed. Little more than a rule of thumb governing the upper limits on damages can be ascertained from the cases.

Goodman & Seaton, *California Supreme Court—Forward: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 Cal. L. Rev. 309, 350 (1974). As the recent California actions against banks demonstrate, the broad discretion conferred on the jury leaves their deliberations readily susceptible to impulsive judgments, particularly in light of the vagueness of the substantive criteria for punitive damage awards and the governing burden of proof, which requires only a finding for plaintiff by the preponderance of the evidence. Moreover, there are no statutorily defined limits and no fixed or suggested ratio to guide a jury in determining what is a "reasonable relation" between compensatory and punitive damages. Thus, in *Commercial Cotton Co.* v. *United California Bank*, *supra*, 163 Cal. App. 3d at 518, the court affirmed a $100,000 punitive assessment imposed in addition to $4,000 in compensatory damages, a ratio of 25 to 1.

Such vast discretion in such volatile circumstances invites great abuse. Jury discretion, as in criminal sentencing, "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976). We believe the Court should consider the following safeguards.

1. *Due Process Requires Proof by Clear and Convincing Evidence*

This Court has applied the three-pronged test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to determine whether due process requires proof by "clear and convincing evidence" in certain types of cases. The *Eldridge* factors are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.[9]

Clearly, punitive damages require a higher burden of proof under this standard: *First*, the interest at stake consists of both the property interest of defendants subject to frequently massive punitive damage awards and the stigma that attends a finding of malicious and oppressive conduct. *Second*, the value of additional safeguards to minimize the risk to a defendant's interests is substantial. In the case of an error in imposing punitive

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[9] *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that clear and convincing evidence is required in certain defamation actions); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (clear and convincing evidence is required to dissolve the parent-child relationship); and *Addington* v. *Texas*, 441 U.S. 418 (1979) (clear and convincing evidence is required to commit a person involuntarily to a mental hospital).

damages, the defendant stands to lose both property and reputation. On the other hand, in the case of an error in refusing to award punitive damages, the plaintiff, whose right to be made whole is unaffected, loses only the windfall of a sanction aimed to vindicate not his own but the public interest. *Third*, the government has no substantial interest in retaining the preponderance of the evidence standard. This Court has already stressed that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 349. Moreover, the state's interest in deterring improper conduct is not undermined by raising the burden of proof as to punitive damages. Even in the case of error, a defendant required to pay compensatory but not punitive damages is likely to be deterred, to that extent, from repeating the conduct that resulted in liability.

2. *Due Process Requires Strict Guidelines for Juries Assessing Punitive Damages*

Unlike compensatory damages, in which the size of the award is determined by the extent of injury proved, or penal fines, in which the size of the fine is limited by statute, punitive assessments are left to a jury's discretion and virtually no guidance is provided. Lacking careful guidelines, juries, already inflamed by a finding of oppression, fraud, or malice, are particularly susceptible to arguments about corporate wealth or malice calculated to appeal to prejudice and passion.

To ensure due process for defendants and reviewability, juries should be required to produce formal written findings, as part of a special verdict, setting forth the reasoning for the amount of punitive assessment. *See Dunlop* v. *Bachowski*, 421 U.S. 560, 571 (1975); *Morrissey* v. *Brewer*, 408 U.S. 471, 487 (1972). Such a requirement would permit courts to determine whether a jury based its assessment on improper considerations,

such as "providing enough money so that a defendant would never have to borrow from a bank again"—the basis for the jury assessment in the *Conlan* case discussed above.

CONCLUSION

As stated, this case presents a broader range of issues than *Bankers Life and Casualty Co.* v. *Crenshaw,* concerning the constitutional safeguards that should apply in cases involving punitive damages, squarely raising not only Eighth Amendment but also due process considerations under the Fourteenth Amendment. For the reasons set forth above and for the additional reasons advanced by petitioner, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

2 California Jury Instructions, Civil, Book of Approved Jury Instructions, [BAJI] 7th ed. 1986

BAJI 14.71 (1986 Revision)

PUNITIVE DAMAGES—RECOVERY OF AND MEASURE

If you find that plaintiff suffered damage as a [proximate] [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant [———————— only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [carried on by the defendant with a conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.] ["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the

jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you decide to award punitive damages to plaintiff against defendant, you shall state the amount of punitive damages separately in your verdict.